# आयकर अपीलीय अधिकरण "के" न्यायपीठ मुंबई में।
# IN THE INCOME TAX APPELLATE TRIBUNAL
# "K" BENCH, MUMBAI

**माननीय** श्री पवन कुमार गडाले, न्यायिक सदस्य एवं
**माननीय** श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।
**BEFORE HON'BLE SHRI PAVAN KUMAR GADALE, JM AND**
**HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM**
(Hearing through Video Conferencing Mode)

आयकरअपील सं./ I.T.A. No.7151/Mum/2017
(**निर्धारण वर्ष /** Assessment Year: 2013-14)

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| **Greatship (India) Ltd.**<br>C/o Kalyaniwalla & Mistry LLP<br>Esplande House, 29, Hazarimal Somani Marg<br>Fort, Mumbai-400 001 | **बनाम**/<br>Vs. | **DCIT-5(1)(1)**<br>Room No. 568, 5th floor,<br>Aaykar Bhavan, M. K. Road,<br>Mumbai-400 020 |
| स्थायीलेखासं./जीआइआरसं./ PAN/GIR No. **AABCG-8542-K** | | |
| (अपीलार्थी**/Appellant**) | : | (प्रत्यर्थी / **Respondent**) |

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| अपीलार्थीकीओरसे/ **Appellant by** | : | Ms. Ritu Kamal Kishore- Ld. AR |
| प्रत्यर्थीकीओरसे/**Respondent by** | : | Shri Sunil Deshpande- Ld. Sr. DR |

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| सुनवाईकीतारीख/ **Date of Hearing** | : | 31/08/2021 |
| घोषणाकीतारीख / **Date of Pronouncement** | : | 05/10/2021 |

## आदेश / O R D E R

**Manoj Kumar Aggarwal (Accountant Member): -**

1. Aforesaid appeal by assessee for Assessment Year (AY) 2013-14 assails final assessment order dated 17/10/2017 passed by Ld. Assessing Officer (AO) u/s 143(3) r.w.s. 144C(13) pursuant to the directions of Ld. Dispute Resolution Panel-I, Mumbai u/s 144C(5) dated 28/09/2017. The grounds raised by the assessee read as under: -

**TRANSFER PRICING ISSUES**

1) The Transfer Pricing Officer (TPO) erred in passing the order under section 92CA(3) in gross violation of principle of natural justice.

2) The TPO erred in not confronting the Appellant with the information / materials collated by him under section 133(6) of the Income-tax Act and upon which he has relied upon to make an adjustment in respect of financial guarantee commission.

3) The Assessing Officer (AO) / Transfer Pricing Officer (TPO) / Dispute Resolution Panel (DRP) erred in holding that the transaction of giving financial guarantee by the Appellant on behalf of its Associated Enterprises (AEs) was an "international transaction" under Section 92B of the Act.

4) The AO / TPO / DRP erred in determining the Arm's Length Price of the financial guarantees given by the Appellant on behalf of its AEs @ 1.25% per annum.

5) The AO / TPO / DRP erred in making a transfer pricing adjustment of Rs.15,45,56,760/- on account of guarantee commission.

6) The AO / TPO / DRP failed to appreciate that giving of financial guarantees by the Appellant on behalf of its subsidiaries was a shareholder activity for which no charge is required.

7) The AO / TPO / DRP erred in law and in facts in rejecting the benchmarking analysis undertaken by the Appellant in respect of guarantee commission in its transfer pricing documentation.

8) Without prejudice to Ground Nos. 1 to *7,* the AO / TPO / DRP erred in computing the arm's length price of the financial guarantees given by the Appellant on behalf of its AEs in an arbitrary manner.

9) The AO / TPO / DRP erred in holding that the interest charged by the Appellant at the rate of LIBOR + 2.9% per annum in respect of loan of USD 71.5 million given to its AE, Greatship Global Holdings Ltd., Mauritius, was not at arm's length.

10) The AO / TPO / DRP erred in making a transfer pricing adjustment of Rs.1,08,54,632/- in respect of loan of USD 71.5 million given by the Appellant to Greatship Global Holdings Ltd., Mauritius by holding that the arm's length price of the loan was LIBOR + 3.332% p.a.

11) The AO / TPO / DRP erred in not following the order of the DRP for the Assessment Year 2011-2012 wherein this very loan given to Greatship Global Holdings Ltd. (GGHL) at interest rate of LIBOR + 2.9% was held to be at arm's length.

12) The AO / TPO / DRP erred in rejecting the benchmarking analysis conducted by the Appellant in respect of interest on loan given to AE, GGHL.

13) Without prejudice to Ground Nos. 9 to 12, the AO / TPO / DRP erred in computing the arm's length price of the loan given by the Appellant to its AE in an arbitrary manner.

**NON-TRANSFER PRICING ISSUES**

14) The AO / DRP erred in taxing the exchange gain of Rs.47,62,45,500/- arising on repayment of loan by the Appellant's subsidiary, GGHL, Mauritius as business income under section 28(iv) of the Income-tax Act.

15) The DRP erred in holding that the exchange gain arising on repayment of loan by the subsidiary was interest and is therefore taxable in the hands of the Appellant.

16) The AO / DRP erred in invoking Rule 8D without recording an objective satisfaction that having regard to the accounts of the Appellant, that the suo-moto disallowance of expenses of Rs.12,18,036/- by the Appellant under section 14A was incorrect.

17) The AO / DRP erred in disallowing further expenses of Rs.26,34,714/- under Section 14A read with Rule 8D(2)(iii).

As evident, the assessee is aggrieved by confirmation of certain Transfer Pricing Adjustments as well as by confirmation of other additions / disallowances.

2. The Ld. AR, at the outset submitted that Transfer Pricing (TP) issues are squarely covered by the earlier decision of Tribunal in assessee's own case for AYs 2012-13 & 2014-15, ITA Nos.1287/Mum/2017 & ors., common order dated 05/04/2021. The copy of the order has been placed on record. The Ld. AR submitted that the transactions are exactly the same and the assessee has benchmarked these transactions following same methodology which has finally been approved by Tribunal in the cited decision. The Ld. AR also assailed the corporate additions as sustained in the final assessment order by placing reliance on various judicial pronouncements. The Ld. DR, on the other hand, supported the assessment framed by Ld. AO. However, the submission that TP issues are covered by the earlier order of the Tribunal could not be controverted. In the above background, our adjudication to the subject-matter of appeal would be as given in succeeding paragraphs.

**Assessment Proceedings**

3.1 The material facts are that the assessee being resident corporate assessee is stated to be engaged in providing offshore oilfield services in India and internationally and also offers offshore logistics and drilling services with a fleet of vessels and rigs owned by it.

3.2 Since the assessee carried out certain international transactions with its Associated Enterprises (AE), the same were referred to Ld. Transfer Pricing Officer-2(2), Mumbai (TPO) u/s 92CA (1) for determination of Arm's

Length Price (ALP). The subject matter of dispute before us is with respect to guarantee commission charged by the assessee from its AEs. It transpired that the assessee tendered financial guarantee to banks on behalf of its two Associated Enterprises (AE) namely Greatship Global Energy Services Pte. Ltd. (GGES) and Greatship Global Offshore Services Pte. Ltd. (GGOS). Though the assessee did not charge any commission from the AEs, however, it suo-moto offered commission rate of 0.46% which was nothing but average guarantee commission paid by the assessee to various banks. In other words, the assessee benchmarked the same on the basis of internal CUP.

However, Ld. TPO, rejecting the rate, worked out average Bank Guarantee Rate of 2.07% and opined that the rate charged for corporate guarantee should not be less than the rate charged by the banks for giving bank guarantees. Finally, adopting this average rate of 2.07%, Ld. TPO proposed net adjustment of Rs.3148.11 Lacs in its order dated 24/10/2016. The working of the same has been tabulated on page-11 of Ld. TPO's order.

3.3 Another TP adjustment was on account of interest on loans granted by the assessee to two of its AEs namely Greatship Global Holdings Ltd., Mauritius (GGHL) and Greatship UK Limited (GUK). With respect to loan to GGHL, the assessee charged interest rate of LIBOR+2.9% whereas it charged interest rate of LIBOR+3% on loan advanced to GUK. The loan to GUK was sanctioned as well as disbursed during financial year 2010-11 whereas loan to GGHL was sanctioned in financial year 2011-12 and disbursed in parts during financial years 2010-11 & 2011-12. Since the interest rates on both the loans were determined at the time of sanction of

the loans, the assessee relied upon benchmarking exercise for financial year 2010-11. In that year, taking assessee as the tested party, these interest rates were benchmarked against mean interest rates charged by banks in respect of foreign currency loans availed by the assessee. Such arithmetic mean came to LIBOR+1.829% and therefore, it was concluded by the assessee that the interest rates were at Arm's Length.

However, rejecting the rate adopted by the assessee, Ld. TPO conducted fresh search on website www.bloomberg.com and worked out average rate of interest @3.332 basis points. Accordingly, it was held that the assessee should have charged interest of LIBOR+3.332% from GGHL. Adopting the same, Ld. TPO proposed an adjustment of Rs.108.54 Lacs as computed on page-13 of Ld. TPO's order. However, no adjustment was proposed on loan advanced to GUK and the same was accepted to be at Arm's Length price.

3.4 The above-said TP adjustments aggregating to Rs.3256.65 Lacs as proposed by Ld.TPO were incorporated by Ld. AO in draft assessment order dated 23/12/2016. In the assessment order, Ld. AO also proposed disallowance u/s 14A for Rs.26.34 Lacs and also made another disallowance of Rs.4762.45 Lacs on account of exchange gain claimed by the assessee as capital expenditure. The draft assessment order was subjected to assessee's objections before Ld. DRP.

3.5 The disallowance u/s 14A stem from the fact that the assessee earned exempt income of Rs.388.87 Lacs and offered suo-moto disallowance of Rs.12.18 Lacs in the computation of income. The same was computed by applying proportion of exempt income to total income to cost incurred on treasury functions. However, rejecting assessee's methodology, Ld. AO

computed disallowance of Rs.38.52 Lacs u/r 8D(2)(iii) being 0.5% of average investments. The differential of Rs.26.34 Lacs was added to the income of the assessee.

3.6 The disallowance of exchange gain stem from the computation of income. It was observed by Ld. AO that the assessee reduced on amount of Rs.4762.45 Lacs on account of exchange gain on repayment of loan by subsidiary treating it as capital receipts. It transpired that the assessee sanctioned loan of USD 75 million to its wholly owned subsidiary company Greatship Global Holdings Ltd., Mauritius (GGHL) in financial year 2010-11. GGHL was an investment company which held share capital in step down subsidiary of the assessee namely Greatship Global Energy Pte. Ltd., Singapore (GGES) as well as Greatship Global offshore Services Pte. Ltd., Singapore (GGOS). It was claimed that the loan was sanctioned in order to enable GGHL to fund capital expenditure of the assessee's step down subsidiaries GGES and GGOS. Accordingly, the assessee disbursed loan of 71.5 million during financial years 2010-11 & 2011-12. As per the plan, GGHL utilized the loan for part funding towards acquisition of rigs by GGES and funding of under-construction vessel by GGOS. During financial year, GGHL repaid loan of USD 58.5 million which resulted into foreign exchange gain of Rs.4762.45 Lacs to the assessee. In the computation of income, the assessee claimed the gains to be capital receipts not chargeable to tax. However, Ld. AO opined that the benefits so gained would be 'Business Income' by virtue of Section 28 of the Act, The assessee filed submissions and relied on the decision of Hon'ble Bombay High Court in the case **of Cadell Weaving Mills Company Private Ltd. V/s CIT (116 Taxman 77;**

**06/02/2001)** as well as the decision of Hon'ble Apex Court in **Sutlej Cotton Mills Ltd. V/s CIT (116 ITR 1; 27/09/1978).**

3.7 However, Ld. AO, relying upon the decision of Hon'ble Bombay High Court in the case of **Solid Containers Limited V/s DCIT (222 CTR 455; 29/08/2008)** opined that the assessee advanced loans to its subsidiaries to spread its own business through subsidiaries and any profit yielded from such investments, whether by way of interest or exchange fluctuation would be revenue receipt which call for taxation u/s 28 of the Act. The decision of Hon'ble Supreme Court **CIT Vs TV Sundaram Iyenger & Sons Ltd. (222 ITR 344; 11/09/1996)** was also referred to strengthen the said conclusion. Accordingly, the amount of exchange fluctuation was added to the income of the assessee.

**Proceedings before Ld. DRP**

4.1 The Ld. DRP, after due deliberations, directed Ld. TPO to adopt guarantee rate of 1.25% as against rate of 2.07% as proposed by Ld. TPO. Regarding benchmarking of loans, it was held that internal CUP used by the assessee was not appropriate and Ld. TPO correctly used external CUP. Therefore, the benchmarking rate proposed by Ld.TPO was confirmed. Regarding disallowance u/s 14A, it was observed that disallowance made by the assessee was a rough estimate and therefore, the disallowance was rightly computed as per Rule 8D(2).

4.2 Regarding taxability of exchange gains, the assessee submitted that the transactions were loan transactions which would be capital in nature and therefore, any gain or loss arising there-from would be capital in nature. Reliance was placed on the decision of Hon'ble Supreme Court in **CIT V/s**

**Tata Locomotive & Engg. Co. Ltd. (60 ITR 405); Sutlej Cotton Mills Ltd. V/s CIT (116 ITR 1); CIT V/s Canara Bank (63 ITR 328);** decision of Hon'ble Bombay High Court in **CIT V/s V.S.Dempo & Co. Pvt. Ltd. (206 ITR 291)** & **Cadell Weaving Mills Company Private Ltd. V/s CIT (116 Taxman 77)** in support of the submissions.

4.3 In the light of all these decisions, the assessee submitted that capital receipt, except covered by Sec.45, are generally exempt from tax. It was also submitted that the provisions of Sec. 28(iv) as invoked by Ld. AO would apply only where the benefit was received in form other than the cash as held by Hon'ble Bombay High Court in **Mahindra & Mahindra Co.Ltd. V/s CIT (261 ITR 501)** which held that Section 28(iv) could not apply to a benefit that arose in cash or in monetary terms.

4.4 However, the aforesaid submissions could not find favor with Ld. DRP who confirmed the stand of Ld. AO by observing as under: -

> Discussion & Directions of DRP
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> 7.8 The submission made by the assessee has been examined. The reliance placed on various decisions has also been perused. The main theme of the assessee's submission is that the foreign exchange loss/gain constitutes a component of the capital advanced by it to the AE and hence, it would not be in the nature of income on revenue account and hence not liable to tax. We are not in agreement with this view.
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> 7.9 While advancing any loan, the key returns expected out of the loan are (i) an amount to account for the depreciation of money value during the period (inflation), (ii) some profit element, (iii) cost of funds to the lender and (iv)return for risk taken by the lender. These four items together form the total interest which a lender is entitled to receive. The interest forms a revenue receipt and is exigible to tax. The first amount compensates for the inflation if the currency of loan and currency of accounts is same. If the inflation rate is high, the interest rate is correspondingly high as the value of the total corpus (amount lent) falls over the years. The inflation varies over different currencies based on the market conditions of the currency in which amount is lent. This is a reason why the interest rates in India are higher than the interest rates outside the country (in other currencies).
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> 7.10. The assessee has advanced loans in US$ but on receipt back of the amount, it has received a higher amount on account of depreciation of Indian Rupee. Such depreciation (foreign exchange difference between the rate and the time of lending and

at the time of return) would represent a component of interest. While receiving interest from the AE, the assessee has been benchmarking its interest at Libor rates which have a disconnect with the Indian inflation and hence such rates do not have Indian inflation rates built into them. However, the inflation is reflected in gradual weakening of the currency and the lender is compensated when he receives the corpus and converts it into Indian currency. This gain, received at the time of conversion, is a part and parcel of the interest component which the lender has received and is required to be treated in a similar fashion.

7.11. We are in agreement with the reliance placed by the AO on the decision in the case of Solid Containers Limited. The income, in the present case, is clearly arising out of the business activity of the assessee company which include investment in foreign subsidiaries for purpose of conduct of its business. The assessee itself, while arguing in respect of earlier grounds, has submitted that these loans represent its investment during the course of its business. There has been a judicial consensus that interest on borrowed funds used for the purpose of investment in subsidiaries is an allowable deduction in the case of investing company irrespective of the fact as to whether the investment is made in form of loans or equity.

7.12. We do not find any error on the part of the AO in bringing the amount to tax. The objection raised by the assessee stands dismissed.

Aggrieved as aforesaid, the assessee is in further appeal before us.

**Our findings & Adjudication**

5. So far as the benchmarking of guarantee commission is concerned, we find that this issue is recurring in nature. The coordinate bench of Tribunal, in its decision for AYs 2012-13 & 2014-15, ITA Nos.1287/Mum/2017 & ors., common order dated 05/04/2021, relying upon the order for AYs 2008-09 & 2009-10, decided this issue in assessee's favor by observing as under: -

……As the Tribunal in its aforesaid order passed in the assessee's own case for the preceding years had approved the determining of ALP of corporate guarantee provided by the assessee to a foreign bank for facilitating raising of loan by its AE by applying of Internal CUP by the assessee i.e the guarantee commission paid by the assessee to a bank for guarantee stood by it on behalf of the assessee for a third party thus, we respectfully follow the view therein taken. Accordingly, we find no infirmity in the adoption of internal CUP i.e the average guarantee fees that was paid by the assessee to, viz. RBS (formerly known as ABN Amro Bank); Kotak Mahindra Bank and Yes Bank, for standing guarantee on its behalf of the assessee in case of third parties, viz. ONGC, BG Exploration etc.

10. Insofar the adequacy of the ALP of the corporate guarantee fees determined by the assessee at 0.43% of the amount of loan is concerned, the same, as observed by us hereinabove is the average of the guarantee fees that was paid by the assessee to various banks for standing guarantees on its behalf for certain third parties. As observed by the Hon'ble High Court in the case of Everest Kento Cylinders Ltd. (supra), higher commission is to be paid for obtaining bank guarantee, as they are easily encashable in the event of default as in comparison to corporate guarantee provided by an assessee company to a bank for facilitating raising of loan by its AE. Accordingly, we are of the considered view that insofar the adequacy of the ALP of the corporate guarantee fees determined by the assessee at 0.43% is concerned, the same in the backdrop of the aforesaid facts cannot be called in question. Apart from that, we find that it was also the claim of the assessee before the lower authorities that Kotak Mahindra Bank (as per its sanction letter) had expressed its willingness to give guarantee on behalf of the AEs at a commission rate of 0.40% p.a/0.50% p.a. In the backdrop of the aforesaid fact, we find substantial force in the claim of the ld. A.R that the aforesaid credit sanction letter too would constitute a CUP for benchmarking the transaction of providing of corporate guarantee by the assessee to the banks for facilitating raising of loans by its AEs. Be that as it may, the adequacy of the ALP of corporate guarantee fee at 0.43% can also safely be gathered by drawing support from the following judicial pronouncements as had been relied upon by the assessee before the lower authorities as well as before us:

| | Particulars | Guarantee Commission rate |
|---|---|---|
| 1. | Everest Kento Cylinder Ltd. Vs. ACIT (201 2) 34 CCH 0528 (Mum) [Note : Order of Tribunal upheld by the Hon'ble High Court of Bombay : CIT Vs. Everest Kento Cylinder Ltd. Vs. CIT (2015) 378 ITR 57 (Bom). | 0.5% |
| 2. | Reliance Industries Ltd. Vs. Addl. CIT (ITA No. 4475/Mum/2007) | 0.38% |
| 3. | Asian Paints Ltd. Vs. Addl. CIT (2014)149 ITD 511(Mumbai) | 0.20% |
| 4. | Aditya Birla Minacs Worldwide Ltd. Vs. JCIT (2016) 47 CCH 760 (Mum) | 0.5% p.a |
| 5. | Godrej Household Products Ltd. Vs. Addl. CIT 41 taxmann.com 386 (Mum) | 0.5 % p.a |
| 6. | Nimbus Communications Limited Vs. Addl. CIT (2014) 149 ITD 0508 (Mumbai) | 0.5% p.a |
| 7. | Hindalco Industries Ltd. Vs. Addl. CIT (62 taxmann.com 181)(Mum) | 0.5% p.a |
| 8. | Manugraph India Ltd. Vs. DCIT (201 5) 43 CCH 348 (Mum) | 0.5 p.a |
| 9. | Prolific Corporation Ltd. Vs. DCIT (55 taxmann.com)(Hyd) | 0.5% p.a |
| 10. | Glenmark Pharmaceuticals Ltd. Vs. Addl. CIT Addl. CIT Vs. Glenmark Pharmaceuticals Ltd. (43taxmann.com 191)(Mum) | 0.53% p.a |

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|---|---|---|
| 11. | Thomas Cook (India) Limited (201 6) 47 CCH 01 62 (Mum) | 0.5% p.a |

> Accordingly, in terms of our aforesaid observations we find no reason to dislodge the ALP of corporate guarantee determined by the assessee at 0.43% p.a by adopting Internal CUP method. In the backdrop of our aforesaid observations we are unable to persuade ourselves to subscribe to the determination of the ALP of the corporate guarantee at 2% p.a by the A.O/TPO. We, thus, uphold the ALP of corporate guarantee as determined by the assessee at 0.43% p.a and direct the A.O/TPO to vacate the upward transfer pricing adjustment of Rs.28,69,70,745/- made in the hands of the assessee. The Grounds of appeal Nos. 1 to 7 are allowed in terms of our aforesaid observations.

Thus, the co-ordinate bench held that benchmarking done by assessee on the basis of internal CUP was to be accepted. Respectfully following earlier decisions of Tribunal, taking the same view, we would hold that benchmarking done by the assessee by adopting internal CUP was in order. The assessee has followed similar methodology in this year. Therefore, the adjustment as confirmed by Ld. DRP, in this regard, stand vacated. The Ld. AO is directed to delete the same. Ground No. 4, 5, 7 & 8 stands allowed which render ground nos. 1 & 2 infructuous. Ground Nos.3 & 6 stand dismissed.

6. Similarly the issue of benchmarking of loan transaction is also recurring in nature and covered by the decision for AYs 2012-13 & 2014-15 (supra) wherein the bench observed as under: -

> 14. We have in the backdrop of the contentions advanced by the authorised representatives for both the parties and perusing the orders of the lower authorities in context thereto, deliberated at length on the issue pertaining to benchmarking of the interest charged by the assessee on the loan advanced by it to its AE, viz. GGHL, Mauritius. Succinctly stated, the assessee had charged interest of Rs. 8,90,20,949/- from its AE, viz. Greatship Global Holdings Ltd. (for short “GGHL”) at the rate of LIBOR plus 2.9% mark-up. As noticed by us hereinabove, the loan to GGHL was sanctioned in the immediately preceding year i.e F.Y 2010-11 and was disbursed in parts in the said preceding year and the current financial year. Considering itself as the tested party, the assessee had benchmarked the interest charged on the loans advanced to its AE, viz.

GGHL on the basis of the arithmetic mean of the interest rate that was paid by it on the foreign currency loans that were availed by it from foreign banks. As the arithmetic mean of the interest rates charged by the banks in respect of the foreign currency loans availed by the assessee worked out at LIBOR + 1.829%, as against the interest that was charged by the assessee on the loan given by it to its AE, viz. GGHL, Mauritius at LIBOR + 2.9% thus, the interest charged on the loan advanced to the AE was claimed to be at arm's length. As observed by us at length hereinabove, the TPO had rejected the Internal CUP that was applied by the assessee for benchmarking the interest charged on the loan advanced to its aforesaid AE, viz. GGHL, Mauritius, primarily for the reason that all the foreign currency loans which had been used as comparable by the assessee were fully secured upto 130% of the value of loan alongwith mortgage of the ship. Further, it was observed by the TPO that the assessee while benchmarking the interest transaction had failed to take cognizance of the mortgage, legal, documentation, insurance and other charges that were paid by the borrower. Also, it was observed by the TPO that not only penal interest was provided for in case of default of interest by the assessee, but the borrower assessee was also obligated to satisfy certain other requirements like maintaining of cash debt equity ratio etc. Backed by his aforesaid observations, the TPO was of the view that if the transaction cost, hedging cost, penal cost and cost of security were taken into consideration then rate of such borrowing would not be less than 700 basis points. On the basis of his aforesaid observations the TPO conducted search on www.bloomberg.com to find out the average interest rate of foreign currency loans taken by companies in Mauritius and finally determined the ALP of interest charged by the assessee on loan advanced to its AE, viz. GGHL, Mauritius at LIBOR + 3.32%. Accordingly, the TPO reworked out the ALP of the interest on the loans advanced by the assessee to its aforesaid AE, viz. GGHL, Mauritius at Rs. 9,87,60,852/- and made an consequential TP adjustment of Rs. 97,39,903/-.

15. Before us, it is the contention of the ld. A.R that as the DRP in the assessee's own case for the immediately preceding year i.e A.Y 2011-12 had held the interest charged by the assessee at LIBOR + 2.9% p.a on the loan in question as at arm's length, therefore, in the absence of any shift in facts during the year in question there was no justification on the part of the TPO/DRP to have held the same as not being at arm's length. We have deliberated at length on the issue in question i.e transfer pricing adjustment carried out by the TPO/DRP as regards the interest charged by the assessee on the loan advanced to its AE, viz. GGHL, Mauritius. In our considered view, the benchmarking of the interest charged by the assessee on the loan advanced to its AE, viz. GGHL by applying internal CUP i.e arithmetic mean of the interest rates that were charged by the banks as regards the foreign currency loans availed by the assessee could not have been rejected by the TPO/DRP. Our aforesaid view is fortified by the order passed by the Tribunal while disposing off the cross-appeals in the case of the holding company of the assessee, viz. The Great Eastern Shipping Company Limited, ITA No. 397/Mum/2012 & ITA No. 437/Mum/2012, dated 10.01.2014 for A.Y 2007-08 (copy on record). In its said order the Internal CUP in the form of interest paid by the assessee company on its own borrowings from bank to benchmark the interest charged by the assessee on a loan given to its AE was accepted. The Tribunal in its said order had upheld the benchmarking of the interest charged by the asseseee on the

loan given to its AE, on the basis of the Internal CUP applied by the assessee i.e interest paid by the assessee on its foreign currency borrowings from KEIXM bank and State Bank of India. Accordingly, respectfully following the view taken by the Tribunal in its aforesaid order, we find no infirmity in benchmarking of the interest charged by the assessee on the loans advanced to its AE, viz. GGHL, Mauritius by applying of an Internal CUP i.e arithmetic mean of the interest rate charged by the banks on the foreign currency loans availed by the assessee during the year in question. Apart from that, we also find substance in the claim raised by the assessee before the lower authorities that the foreign currency loans obtained by its holding company viz. Great Eastern Shipping Company Ltd. at an interest rate of LIBOR + 1.79% p.a and LIBOR + 1.50% p.a during the year in question would also form a suitable Internal CUP. Further, we are of the considered view that in case of availability of an Internal CUP there was no need on the part of the TPO to have benchmarked the transaction by applying an external CUP. Our aforesaid conviction is supported from Para 3.26 of OECD guidelines, which reads as under:

> "Internal comparables may have a more direct and closer relationship to the transaction under review than external comparable."

As observed by us hereinabove, the Board of Directors of the assessee company had sanctioned a loan of USD 75 million in the immediately preceding financial year 2010-11 on which interest rate of LIBOR + 2.9% p.a was fixed. Loan of USD 40 million was disbursed by the assessee to its AE in the financial year 201-11. Further, during the year in question i.e period relevant to A.Y 2012-13 a further loan of USD 31.5 million was disbursed to the AE. TPO in the immediately preceding year i.e period relevant to A.Y 2011-12 had made a TP adjustment in respect of the loan of USD 40 million that was disbursed during the said preceding year and had determined the ALP of the interest charged by the assessee on the said loan at 6.17% p.a. However, the DRP had vide its order for A.Y 2011-12 held that the interest charged by the assessee on the loan advanced to its AE was at arm's length. In our considered view, now when DRP in the case of the assessee for A.Y 2011-12 had held that the interest charged by the assessee on the loan advanced to its AE at LIBOR + 2.9% was at arm's length, therefore, there would be no justification in holding the same as not being at arm's length during the year in question i.e A.Y 2012-13. Also, the DRP in the assessee's case for A.Y 2010-11 had held that the interest rate of LIBOR + 300 basis points that was charged by the assessee on a loan of USD 4 million given to its AE, viz. GGES (and repaid) as being at arm's length. In the backdrop of the aforesaid facts, we find that the DRP had consistently been holding the interest rate of LIBOR + 2.9% / 3% charged by the assessee on the loans advanced to its AEs as at arm's length. On the basis of our aforesaid observations, we uphold the Internal CUP applied by the assessee for benchmarking the interest charged on the loans advanced to its AE, viz. GGHL; and hold the interest charged by it on the loan advanced to its AE, viz. GGHL at LIBOR + 2.9% as being at arm's length. The Grounds of appeal Nos. 8 to 11 are allowed in terms of our aforesaid observations.

The bench has approved the benchmarking of these transactions on the basis of internal CUP. We find the facts to be similar in this year. The assessee has followed same methodology to benchmark the loan transactions. Therefore, the adjustment as confirmed by Ld. DRP would stand deleted. We order so. Ground Nos. 9 to 12 stands allowed which render alternative ground no.13 as infructuous in nature.

7. Ground Nos. 16 and 17 are related to disallowance u/s 14A. We find that this issue has also been dealt with by the coordinate bench in its order for AYs 2012-13 & 2014-15 (supra) wherein the matter has been restored back to the file of Ld. AO with following directions: -

> 25. We have heard the authorised representatives for both the parties in context of the aforesaid issue pertaining to the sustainability of disallowance computed by the A.O under Sec. 14A r.w Rule 8D. As observed by us hereinabove, the assessee had suo motto offered a disallowance u/s 14A of Rs.22,63,129/-. Basis of computing the aforesaid disallowance by the assessee was appropriation of the treasury expenses on a pro-rata basis i.e percentage of exempt income to the total income from its investments, which, however, was rejected by the A.O. It is the claim of the ld. A.R that as the A.O while rejecting the suo-motto disallowance that was offered by the assessee in its return of income had failed to record his satisfaction that having regard to the accounts of the assessee as placed before him it was not possible to generate the reasonable satisfaction with regard to the correctness of the claim of the assessee thus, on the said count itself the disallowance so enhanced by him was liable to be vacated. We have given a thoughtful consideration to the aforesaid contention of the assessee and find substantial force in the same. As observed by the Hon'ble Supreme Court in the case of **Godrej & Boyce Manufacturing Company Ltd. Vs. DCIT & Anr. (2017) 394 ITR 449 (SC),** it is only after the A.O had recorded his dissatisfaction as regards the correctness of the claim of the assessee that he can thereafter invoke the provisions of Sec.14A(2) and (3) r.w. Rule 8D. The Hon'ble Apex Court in its aforesaid order had observed as under:
>
> > "37. We do not see how in the aforesaid fact situation a different view could have been taken for the Assessment Year 2002-2003. Sub-sections (2) and (3) of Section 14A of the Act read with Rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the assessee. Whether such determination is to be made on application of the formula prescribed under Rule 8D or in the best judgment of the Assessing Officer, what the law postulates is the requirement of a satisfaction in the Assessing Officer that having regard to

> the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. It is only thereafter that the provisions of Section 14A(2) and (3) read with Rule 8D of the Rules or a best judgment determination, as earlier prevailing, would become applicable."
>
> Similar view had thereafter been taken by the Hon'ble Apex Court in the case of **Maxopp Investment Ltd. Vs. CIT (2018) 402 ITR 640 (SC)**. We find that involving identical facts in the case of the assessee for A.Y 2008-09 & A.Y 2009-10, wherein a suo-motto disallowance offered by the assessee was rejected by the A.O, and was thereafter substituted by an enhanced amount of disallowance as per the methodology contemplated in Sec. 14A r.w Rule 8D, that on appeal the Tribunal vide its consolidated order passed in ITA No.7673/Mum/2012 and **ITA No. 1703/Mum/2014, dated 21.06.2019** had set aside the matter to the file of the A.O for the purpose of re-adjudicating the disallowance afresh in light of the law laid down by the **Hon'ble Apex Court** in the case of **Maxopp Investment Ltd. Vs. CIT (2018) 402 ITR 640 (SC).** As the fact situation in the case of the assessee before us remains the same as was there before the Tribunal in the assessee's case for A.Y 2008-09 & A.Y 2009-10, therefore, for the sake of consistency and in all fairness we herein on the same terms set-aside the matter to the file of the A.O for the purpose of readjudicating the issue afresh in light of the judgment of the Hon'ble Apex Court in the case of **Maxopp Investment Ltd. Vs. CIT (2018) 402 ITR 640 (SC).** Needless to say, the A.O shall in the course of the set-aside proceedings afford a reasonable opportunity of being heard to the assessee who shall remain at a liberty to substantiate its claim that the suo-motto disallowance under Sec. 14A so offered by it in its return of income is in order. The Grounds of appeal Nos. 15 & 16 are allowed for statistical purposes.

Factual matrix being the same, the matter of disallowance u/s 14A stand restored back to the file of Ld. AO with similar directions. Ground Nos. 16 & 17 stands allowed for statistical purposes.

8.1 Ground Nos. 14 & 15 are related to taxation of foreign exchange gains on loan transactions. We find that Ld.AO has held the gain to be 'Business Income' by virtue of Section 28 (iv) of the Act which provide that value of any benefit or perquisite, whether convertible into money or not, arising from the business or the exercise of profession would be chargeable as Profit and Gains of business or profession. The Ld. DRP has confirmed the stand of Ld. AO, inter-alia, by observing that while advancing any loan, the key returns expected out of the loan are to compensate for risk of granting

of loan, depreciation of money value, cost of funds and some profit element. These four items together would form the total interest which a lender is entitled to receive. What the assessee has received is higher amount on account of depreciation of Indian Rupee. Such depreciation (foreign exchange difference of rate at the time of lending and at the time of return) would represent a component of interest. Further, while receiving interest from the AE, the assessee has been benchmarking its interest at LIBOR which have a disconnect with the Indian inflation and hence such rates do not have Indian inflation rates built into them. However, the inflation is reflected in gradual weakening of the currency and the lender is compensated when he receives the corpus and converts it into Indian currency. This gain, received at the time of conversion, is a part and parcel of the interest component which the lender has received and is required to be treated in a similar fashion. Further, the income was arising out of business activity of the assessee which includes investment in foreign subsidiaries for the purpose of conduct of its business. Accordingly, the action of Ld. AO was upheld.

8.2 We find that the assessee has sanctioned loan of USD 75 million to its wholly owned subsidiary entity GGHL during financial year 2010-11 in order to enable GGHL to fund capital expenditure of the assessee's step down subsidiaries viz. GGES and GGOS. The loan of USD 40 million was disbursed in FY 2010-11 whereas loan of USD 31.5 million was disbursed in FY 2011-12. GGHL is stated to be an investment company. Accordingly, GGHL utilized the loan taken from the assessee for giving onward loans to GGES and GGOS. Finally, GGES utilized the loan for part funding of

construction of new rig at Dubai whereas GGOS utilized the loan for part funding of construction of vessel at Singapore. Thus it could be seen that the nature and purpose of the expenditure was capital in nature and the funds have ultimately been used for capital purposes only. The decisive test to determine the nature of transaction would be the final use of money lent by the assessee which, in present case, happens to be in capital field. Therefore, the reasoning of the assessee that exchange gain on repayment would be capital receipt has to be accepted. The transaction of loan was in capital field and consequently, any gain or loss made thereon would be capital receipt.

8.3 Our aforesaid view is duly fortified by the decision of Hon'ble Bombay High Court in **Cadell Weaving Mills Company Private Ltd. V/s CIT (116 Taxman 77)** which held that capital receipt is generally exempt from tax unless it is expressly taxable u/s 45. The Hon'ble Apex Court in **Sutlej Cotton Mills Ltd. V/s CIT (116 ITR 1)** observed that loss in respect of trading asset would be trading loss but loss arising from capital asset would be capital loss. If the amount was held as capital asset, loss arising from the depreciation would be capital loss. Following this decision, Hon'ble High Court of Bombay in **CIT V/s V.S.Dempo & Co. Pvt. Ltd. (206 ITR 291)** summarized the position as under: -

(i) A loss arising in the process of conversion of foreign currency which is part of trading asset of the assessee is a trading loss as any other loss.

(ii) In determining the true nature and character of the loss, the cause which occasions the loss is immaterial; what is material is whether the loss has occurred in the course of carrying on the business or is incidental to it.

(iii) If there is loss in a trading asset, it would be a trading loss, whatever be its cause because it would be a loss in the course of carrying on the business.

(*iv*) Loss in respect of circulating capital is revenue loss whereas loss in respect of fixed capital is not.

(iv) Loss resulting from depreciation of the foreign currency which is utilised or intended to be utilised in business and is part of the circulating capital, would be a trading loss, but depreciation of fixed capital on account of alteration in exchange rate would be capital loss.

(v) For determining whether devaluation loss is revenue loss or capital loss what is relevant is the utilisation of the amount at the time of devaluation and not the object for which the loan had been obtained. Even if the foreign currency was intended or had originally been utilised, for acquisition of fixed asset, if at the time of devaluation it had changed its character and had assumed the new character of stock-in-trade or circulating capital, the loss that occurred on account of devaluation shall be a revenue loss and not a capital loss.

(*vii*) The way in which the entries are made by an assessee in the books of account is not determinative of the question whether the assessee has earned any profit or suffered any loss. What is necessary to be considered is the true nature of the transaction and whether in fact it has resulted in profit or loss to the assessee.

Similarly, Hon'ble Supreme Court has confirmed the decision of Hon'ble High Court in **CIT V/s Tata Locomotive & Engg. Co. Ltd. (60 ITR 405)** which held that surplus arising as a result of devaluation in the process of conversion of foreign currency into rupee currency was an accretion to fixed capital and not liable to tax.

8.4 The case law of Hon'ble High Court of Bombay in **Solid Containers Limited V/s DCIT (222 CTR 455)** is a case where the assessee had taken loan which was written-back by the assessee which is not the case here. Similarly, the decision of Hon'ble Supreme Court in **CIT Vs TV Sundaram Iyenger & Sons Ltd. (222 ITR 344)** is a case where the assessee had accepted certain deposits from the customers which were written back. Therefore, these case laws are not applicable to the facts of present case.

8.5 The reasoning of Ld. DRP that foreign exchange differences would represent component of interest overlook the fact that loan transactions were in capital field and any accretion on capital account, unless specifically taxed, would not be liable to tax.

8.6 Another aspect of the matter is that Ld. AO has invoked the provisions of Sec. 28(iv) to make the additions. However, as per the decision of Hon'ble High Court in **Mahindra & Mahindra Ltd. V/s CIT (261 ITR 501),** the provisions of Sec. 28(iv) are not applicable to a benefit that arose in cash or monetary terms. This decision has been upheld by Hon'ble Supreme Court on 24/04/2018 which is reported at 404 ITR 1. In the present case, the benefit received by the assessee upon repayment of loan is in the form of cash and therefore, the provisions as invoked by Ld. AO do not have any applicability to the facts of the case.

8.7 Therefore, on the facts and circumstances of the case and in the light of settled legal position, we would hold that foreign exchange gains as arisen to the assessee were in capital field and hence, not liable to tax. We order so. Ground Nos. 14 & 15 stand allowed.

## Conclusion

9. The appeal stand partly allowed.

*Order pronounced on 5th October, 2021.*

| | |
|---|---|
| **Sd/-** | **Sd/-** |
| **(Pavan Kumar Gadale)** | **(Manoj Kumar Aggarwal)** |
| न्यायिक सदस्य **/ Judicial Member** | लेखा सदस्य **/ Accountant Member** |

मुंबई Mumbai; दिनांक Dated : 05/10/2021
*Sr.PS, Dhananjay*

**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

**आदेशानुसार/** BY ORDER,

**उप/सहायक पंजीकार** (Dy./Asstt.Registrar)
**आयकरअपीलीयअधिकरण,** मुंबई **/ ITAT, Mumbai.**